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No. 214.

IN THE

# Supreme Court of the United States

October Term, 1949.

UNITED STATES OF AMERICA, Petitioner,

vs.

CUMBERLAND PUBLIC SERVICE COMPANY, a Corporation,
Respondent.

On Writ of Certiorari to The United States
Court of Claims.

# BRIEF FOR THE RESPONDENT.

[redacted]

[redacted]

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## BRIEF FOR THE RESPONDENT.

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### Opinion Below.

The special findings of fact and opinion of the Court of Claims (R. 55-76), together with the dissenting opinion of Judge Madden (R. 76-77), are reported at 83 F. Supp. 843.

### Jurisdiction.

The judgment of the Court of Claims was entered on May 2, 1949 (R. 77). A petition for a writ of certiorari was filed on July 28, 1949, and was granted on October 17, 1949 (R. 78). The jurisdiction of this Court rests on 28 U. S. C., Section 1255(1).

## QUESTION PRESENTED.

The respondent does not agree that the question presented in this case has been accurately stated by the Solicitor General in his brief herein.

The owners of all of the outstanding shares of capital stock of Cumberland Public Service Company entered into negotiations looking to the sale of their stock. These negotiations continued over a period of several months and an offer in the sum of $86,750 was received, it being the understanding of the stockholders that this was an offer for the purchase of their stock. Subsequently it was disclosed that the proposed purchaser could not legally acquire stock in a corporation, but could legally acquire physical assets. At this point the proposed purchaser for the first time made an offer in the sum of $104,000 directly to the corporation for the physical assets desired by the purchaser. The corporation considered this offer and unqualifiedly rejected it. At the same time, the stockholders, acting through two of their number who agreed to serve as agents for all, undertook to acquire designated physical assets as a dividend in kind, in liquidation of the corporation, and offered to sell these assets for $104,000. This offer was accepted by the purchaser, the corporation was duly dissolved, the transfer as a liquidating dividend was duly made, and the stockholders then made the sale. The corporation completely and finally wound up its affairs by distributing some of its remaining assets in kind as another liqui-

dating dividend and by selling the rest and distributing the proceeds of the sales of its stockholders.

The corporation did not negotiate for the sale of the physical assets and the only offer received by the corporation was the result of the stockholders' negotiations for the sale of their stock.

The question presented is not whether the process described was effective to *relieve* the corporation from tax liability, as the Government asserts, but whether any tax liability *accrued to the corporation in the first place* as a result of the events disclosed by the findings of fact.

## STATUTES AND REGULATIONS INVOLVED.

The statutes and regulations involved in this case are correctly set forth on pages 2 to 4 of the Government's brief. They will also be found in Appendix A.

## COUNTERSTATEMENT OF THE FACTS.

The Government's summary of the special findings of fact made by the Court of Claims (R. 56, *et seq.*) are fair as far as they go, but the Government has omitted any reference to facts which are important in the taxpayer's theory of the case and which were held by the Court of Claims to be controlling. It is, therefore, necessary for us to supplement the Government's summary of the facts.

The Government's summary of the findings is fair and accurate in its description of the nature of the

taxpayer corporation's business, the ownership of the capital stock of taxpayer, the organization of Tri-County Electric Membership Corporation (which we will also refer to as Tri-County), and the events which transpired before February 16, 1940. On that date the parties met at Murfreesboro, Tennessee, to discuss the possibility of the acquisition by Tri-County of the transmission and distribution lines of the taxpayer (Finding 6, R. 59). At that meeting Mr. McComas made no offer except to sell all of the outstanding capital stock of the taxpayer corporation. Representatives of the REA expressed some doubt as to whether or not that organization could finance a purchase of the stock of the Company, but the determination of this question was deferred until the legal representatives of the REA could be consulted[1] (R. 59-60).

No decision of the REA legal staff on this point was communicated to the taxpayer, its stockholders, or their attorneys until May 15, 1940, when Attorney Arthur Grafton visited the Washington office of REA. After Grafton was definitely advised that the REA could not lawfully advance money to Tri-County for the acquisition of the stock of taxpayer, but could advance money for the purchase of the properties them-

[1]Mr. McComas' attorney had considerable justification for believing that the REA could legally make a loan for the purchase of capital stock. A close analogy to the situation is found in Section 179 of the Constitution of Kentucky, which provides in part: "The General Assembly shall not authorize any county or subdivision thereof, city, town or incorporated district, to become a stockholder in any company, association or corporation * * *." Yet in *Maysville & Lexington Turnpike Road Co.* v. *Wiggins*, 104 Ky. 540, 47 S. W. 434, *Long* v. *Mayo*, 271 Ky. 192, 111 S. W. 2d 633, and *Cawood* v. *Coleman*, 294 Ky. 858, 172 S. W. 2d 548, the highest court of Kentucky has construed the Constitution as not prohibiting a municipality from purchasing all of the stock of a corporation if the corporation is immediately to be dissolved and its assets transferred to the municipality.

selves, the REA engineer, Mr. Herring, made an offer of $104,000 for the physical properties desired (R. 61). No offer to purchase the properties from the corporation was made prior to May 15, 1940, and what was done between February 16th and May 15th represented the efforts of the parties to agree as to price, it being obvious that the legal question posed at the Murfreesboro meeting on February 16th would be moot if price agreement could not be reached. Prior to May 15, 1940, the only offer made by anyone was the offer of the stockholders to sell all of the outstanding stock. It was during this period, prior to the announcement of the REA legal decision and at the time when the only outstanding offer was the offer to sell the stock, that the REA engineer, Mr. Herring, wrote to Mr. McComas the letter of April 11, 1940, offering $86,750 (R. 60-61). That letter significantly was not addressed to the taxpayer corporation or to Mr. McComas as president of the taxpayer corporation, but was simply addressed to W. L. McComas (R. 60). We submit that Mr. McComas could not have understood that letter to be other than a suggestion of the price REA would approve for the only thing McComas had offered to sell—that is, the outstanding stock.

When Mr. Herring made the offer of $104,000 for the physical properties on May 15, 1940, Attorney Arthur Grafton communicated the offer to McComas and Mayes who, with their families, owned all of the outstanding stock of the corporation. McComas and Mayes directed Grafton to write to Herring a letter (R. 61) declining to take any action on the offer until

the tax consequences might be investigated. A firm of certified public accountants was thereupon employed to prepare computations of the taxes which would be incurred in the various ways through which Tri-County could acquire the assets which it desired. These computations disclosed that if the corporation sold the assets to Tri-County for $104,000, a gain would be realized by the corporation, giving rise to a tax liability. That tax was subsequently assessed by the Commissioner of Internal Revenue in the sum of $17,054.70 (R. 57). It is obvious that the price offered for the assets would, after payment of the tax, net the corporation only $87,000 and this figure was almost identical with the offer of April 11, 1940, which the stockholders understood to be an offer for their stock, the sale of which would not have given rise to the $17,000 tax liability. The stockholders decided that the corporation should reject the $104,000 offer and it was flatly rejected in Grafton's letter to Mr. Herring on May 31, 1940 (R. 62).

There is no finding of fact that the corporation participated in the negotiations which were conducted by the stockholders prior to May 15, 1940 in an effort to sell their stock, and there is no finding of fact that the corporation took any action on the offer of May 15, 1940, except to consider it for sixteen days and emphatically reject it.

In the same letter dated May 31, 1940, and after the unqualified rejection of the $104,000 offer, Mr. McComas and Mr. Mayes offered as a new proposition to acquire from the taxpayer the properties desired

by Tri-County and thereafter to sell them to Tri-County for $104,000, provided certain conditions could be met (R. 62-64).

It was this new offer on the part of McComas and Mayes which was accepted by Tri-County (R. 64) and the subsequent written agreement clearly shows that the properties were to be sold by McComas and Mayes. The taxpayer corporation was not a party to the instrument (R. 64-65) and did not receive the agreed consideration directly or indirectly.

Thereafter the members of Mr. McComas' family transferred their stock on the records of the corporation to W. L. McComas pursuant to written contracts wherein he was designated as their agent to assist in the liquidation of the corporation and to receive for them their distributable portion of the assets of the corporation (R. 65). The Mayes group of stockholders also transferred their shares of stock to E. S. Mayes pursuant to similar agreements, excepting only three shares which were retained by F. M. Mayes, because Kentucky law at that time required a corporation to have three directors, each of whom was required to own three shares of stock.[2]

Steps were then taken pursuant to then existing Kentucky Law[3] and the corporation was dissolved (R. 65-68). In the proceedings, conveyance of the transmission and distribution lines to the stockholders as a liquidating dividend in kind was authorized (R. 67), and this was done on October 22, 1940 by means

[2]Carroll's Kentucky Statutes, 1936 Edition, Section 551.
[3]Carroll's Kentucky Statutes, 1936 Edition, Section 561.

of a deed to W. L. McComas and E. S. Mayes, who were then the only stockholders of record, F. M. Mayes having transferred his qualifying shares to E. S. Mayes the day before (R. 68). Two days later McComas and Mayes (joined by their wives for the purpose of conveying their dower interests) executed and delivered a deed to Tri-County and received the agreed consideration (R. 68-69).

The corporation then proceeded to wind up its affairs by distributing in kind $37,000 of mortgage notes of another corporation, transferring certain life insurance policies to the insured persons named therein for the exact amount which the corporation had invested in the policies, and by selling the remaining physical assets and the accounts receivable (R. 69-71).

The corporation was thus completely and finally dissolved and since the latter part of 1940 has had no business or affairs except this litigation.

## SUMMARY OF THE ARGUMENT.

As a preliminary to our detailed discussion of the points raised by the government, we believe it will be helpful if we isolate and articulate the major fallacy which permeates the government's argument. Once this fallacy is examined and its nature understood, it will become clear that the petitioner's argument, ingenious though it is, fails to grapple with the real issue in the case.

The fallacy, in brief, is the government's bland assumption that a certain taxable event (a sale by the

corporation) did in fact take place, and that the question is therefore whether "a liquidation distribution can be utilized to *relieve the corporation from tax*" (Petitioner's brief, p. 2; emphasis ours). If that were the question, this case would never have arisen. If the corporation had made the sale, the resulting gain would obviously have been taxed to it and the corporation could have found no legal basis whatever for contending that its subsequent dissolution could in any way have diminished or cancelled that tax liability.

It will thus be seen that the government assumes at the outset the very point which is here in issue—that is to say, whether the corporation did or did not make the sale to Tri-County. The government's brief is not addressed to this issue but starts at the point where this case should finish.

The Government's brief (p. 14) correctly states that "a corporation is a separate taxable entity from its stockholders; the corporate income, for tax purposes, cannot be imputed directly to the stockholders, no matter what the devices employed," citing *National Carbide Corp.* v. *Commissioner*, 336 U. S. 422; *Commissioner* v. *Court Holding Co.*, 324 U. S. 331; *Moline Properties* v. *Commissioner*, 319 U. S. 436, and other cases. The reverse is equally as true. The income of the stockholders may not be imputed directly to the corporation unless from an examination of the acts of the parties and the surrounding circumstances, the conclusion can be reached that the stockholders were

acting as agents of the corporation and not for themselves.

The Government's argument, in effect, is that since the corporation could have made a sale, the stockholders must have made the sale as agents of the corporation. We submit that this is not good law, despite the fact that a United States Court of Appeals has, we believe carelessly, said so.[4] The Court of Claims (R. bottom of p. 75 and top of p. 76), after hearing the evidence, said:

> "From the very beginning it was the stockholders who were negotiating for the sale of their stock. There was never any intention that the corporation should make the sale, and even when the REA determined that they could not furnish the money to Tri-County to buy the stock, the stockholders still persisted in their purpose of making the sale for themselves, and for this reason they caused a dissolution of the plaintiff company, and the stockholders then in fact made the sale of the physical properties received by them as a liquidating dividend."

As we will undertake to demonstrate in detail later in this brief, *Commissioner* v. *Court Holding Co., supra,* is not controlling here. There the corporation in fact made the agreement to sell and the *corporation's* sale was then carried out under guise of a sale by the stockholders. The agreement to sell was the taxable event and it gave rise to a corporate tax

[4]United States Court of Appeals for the Third Circuit in *Kaufmann* v. *Commissioner*, 175 F. 2d 28. *Contra, Howell Turpentine Co.* v. *Commissioner*, United States Court of Appeals for the Fifth Circuit, 162 F. 2d 319.

liability for that reason. In our case the corporation made no such agreement. Instead the stockholders, acting for themselves and not as agents for the corporation, made the sale and incurred a lesser tax liability of their own which they have long since paid. Since a corporation and its stockholders are recognized separate entities, for tax as well as other purposes, each must respond for its own actions and neither may be charged with the actions of the other. Similarly a corporation is not liable for a tort of a stockholder and a stockholder is not liable for a tort of the corporation.

The decisions of this Court which are invoked by the petitioner are irrelevant. In the detailed argument, we will discuss each case, but here it is enough to say that cases involving corporate reorganizations (whether pretended or real) are not in point, for the relief from taxation which is available through genuine reorganizations is by way of an exemption from a liability otherwise imposed by law, whereas here the issue is whether a tax liability arose in the first place. Neither are we concerned with cases[5] where corporations remained in existence and attempted to route income or property directly to stockholders, for in our case the corporation was finally and completely dissolved. Nor was any sham or useless device employed here as in *Gregory* v. *Helvering*, 293 U. S. 465, for a corporate dissolution is by no means a "device" of any sort. If the corporation had sold its property, as the Government wishes it had done, the corporation

[5] *Minnesota Tea Co.* v. *Helvering*, 302 U. S. 609; *United States* v. *Joliet & Chicago R. Co.*, 315 U. S. 44.

would nevertheless have dissolved and distributed its assets as the logical result of having divested itself of those franchises and properties with which it carried on the business for which it was created. Under such circumstances the Government certainly would not suggest that dissolution would have been either unreal or useless. Surely the mere fact that a logical, lawful, and real course of action was pursued at one time rather than at another time cannot change its character.

It is true, of course, that the present Internal Revenue Code embodies a rule which, as applied to the sale of all or nearly all of a corporation's assets, makes tax liability depend on the sequence of events more than on the substance of the transaction. If stockholders of a corporation sell their stock, no tax liability on any resulting gain accrues to the corporation. If there is a gain from the sale, that gain is taxable to the stockholders. If the purchaser of the stock then liquidates the corporation, there is ordinarily no tax on the purchaser because the value of the property received in liquidation is no greater than the cost basis of the stock. However, if the corporation sells its assets and then liquidates with resulting distribution to the stockholders, the corporation must first pay one tax upon its gain and the stockholders must then pay a second tax on the gain to them, represented by the difference between the value of the assets distributed to them and the cost basis of their stock.

In each instance the end result is precisely the same yet by reason of the fact that the transactions are handled in different ways, there is a vast difference in the amounts of the resulting taxes. Form is thus given greater dignity than substance.

For present purposes there is no occasion for us either to approve or criticize this rule of law.[6] The significant fact, for the purposes of this case, is that the existing laws do not express any intention to impose the double tax where a corporation is dissolved, its properties are distributed in liquidation, and the stockholders make a sale thereof. Neither do the laws negative such an intention. Section 22 of the Internal Revenue Code[7] defines "gross income" but contains no language which throws any light upon the congressional intent in this respect. The Treasury Regulations[8] affirmatively provide that the corporation does not realize a gain or loss from the mere distribution of its assets in kind in partial or complete liquidation. The Government is here urging the Court to legislate, and to do so contrary to the Government's own regulations.

The present case is a good example of the way in which the Commissioner of Internal Revenue consistently attempts to seize upon language used by this Court and use it as a means of stretching and distort-

[6]The rule has been criticized by responsible authority and it has been recommended to Congress that only one tax be imposed regardless of the form of transaction (Report of the Special Tax Study Committee appointed pursuant to HR 293 and HR 297—80th Congress—Heading, "Sales of Corporate Stock or Property."

[7]Reproduced in Appendix A.

[8]Treasury Regulations 103, Section 19.22(a)-19 and Section 19.22 (a)-21, reproduced in Appendix A.

ing the law to extremes which were never intended. Other examples are the so-called Clifford Trust Cases and the family partnership cases in which the Commissioner has consistently urged upon the lower courts extreme interpretations which have obliged this Court to assume jurisdiction again and restrict the application of earlier decisions within reasonable bounds.

Here the extremes are easy to understand. At one end of the line is the situation where a corporation clearly sells its property, realizes a gain, and incurs a tax liability. At the other end of the line is the situation, suggested by a footnote in the Government's brief, where a corporation dissolves and distributes its assets to its stockholders, and thereafter, considerable time having elapsed, the stockholders make a sale which they did not have any idea of making at the time of the corporate dissolution. In such a situation the Government concedes that no liability would accrue to the corporation, and the stockholders would simply pay taxes resulting from their own gains.

Between these two extremes there will be as many variations of factual situations as there are corporations, stockholders, and purchasers. We submit that it is the function of the finders of the facts to examine the evidence, including not only the overt acts of the parties and what they say they thought and did but also every surrounding circumstance which might tend to demonstrate the substance of what took place. From such an examination the finders of the facts should ascertain what occurred—whether the corporation in question really made a sale or did not make a

sale. If it is concluded as a question of fact that the corporation did make a sale, then the corporation must respond for its own action and pay whatever tax liability grows out of that sale. If it is concluded as a question of fact that the corporation did not make the sale, then the corporate entity may not be subjected to a tax liability which arises out of the actions of separate taxable entities—the stockholders.

The Court of Claims examined the evidence in this case and found that no sale was made by the corporation. The Government urges that this Court, contrary to the Government's own regulations, should uphold a tax assessed by the Commissioner against the corporation for an alleged act which has been found not to have occurred. In substance the Government argues that the sale must be regarded as having been made by the corporation if, at the time the stockholders received the corporate assets in liquidation, they intended to dispose of such assets rather than keep them in their own hands for the indefinite future.

Any such rule as this, imposing a tax liability on one taxable entity by reason of what transpires in the mind of another taxable entity, would indeed bring about a far greater confusion in the administration of the tax laws than the alleged confusion of which the Government here complains. Indeed, such a rule would reduce tax administration to a ghastly mess. The Government does not suggest the answers to many difficult questions which would be posed by such a rule and which could only be settled by interminable litigation. Suppose some but not all of the stockholders

intend to dispose immediately of the assets received in liquidation. Would the corporation then be liable for a tax in proportion to the number of stockholders so intending? Suppose all or some of the stockholders intend to make an immediate resale and later change their minds or find that a sale cannot be consummated. Would the corporation then have a tax liability one minute and not have a tax liability the next minute?

The answer, which is clear and easy to apply, as well as logical and consistent with recognized principles of law, is that the corporation must answer, for tax purposes as well as for every other purpose, for its own actions and cannot be required to answer for the acts, much less the intentions, of other than its own agents. When the finders of the facts have determined who made the sale, the applicable tax liability is then fixed and that is the end of the matter. The *Court Holding Co.* case was one in which the corporation was found to have made a sale of its property and therefore became liable for a tax on the resulting "gross income" as defined by Congress. The *Court Holding Co.* case does not, as the Government here contends, say that a sale found by the triers of the facts to have been made by the stockholders may or should be treated as a sale of the corporation.

As this Court said in *Commissioner* v. *Culbertson* (decided June 27, 1949), "The vagaries of human experience preclude reliance upon even good faith intent as to future conduct as a basis for the present taxation of income."

Taxpayers are not required to choose that course of action which brings upon them the greatest tax liability, and they should not be expected to do so. This Court has on many occasions affirmed the right of taxpayers to choose the course which results in the least tax liability. That is all that was done by the stockholders of Cumberland Public Service Company.

## ARGUMENT.

**FIRST POINT: It Is Permissible for the Stockholders of a Corporation to Contract for the Sale of Property Which They Anticipate Receiving In A Prospective Liquidation. In Doing So They Are Not Agents of the Corporation.**

When we think of corporations the most natural picture which comes to mind is that of a large corporation having a large volume of business, numerous creditors, several classes of stock, and a vast number of stockholders. Management is quite often in the hands of persons who are not stockholders or who in any event do not have voting control. At stockholders' meetings, there is never 100% representation of the stockholders. The interests of the holders of various classes of stock are quite often different. The officers and directors are in a very real sense trustees for stockholders too numerous to participate personally in the management of the corporate affairs. The correct rule of law governing the conduct of such officers and directors is that they stand in a fiduciary relationship

to the stockholders and may not deal with the property of the corporation for their own benefit.

The same rule of law applies in the case of a small corporation whose stock is closely held in one or more family groups, as in the case of the taxpayer here. However, in the case of the small family corporation, it is possible for a situation to exist which is practically impossible in the case of the larger corporations—that is to say, the best interests of all of the stockholders may easily be ascertained and all of the stockholders can be in complete agreement as to the desirability or undesirability of any given course of action. In the case of such small family corporations, the officers and directors are still trustees for the stockholders, but the stockholders are themselves and members of their families having interests identical with their own. In such a case if the rights and interests of creditors of the corporation are not affected, the interests of the corporation and the interests of the stockholders are identical. We submit, therefore, that actions of the officers and directors which serve the best interests of all the stockholders, do not prejudice the rights of creditors, and are within the course of established corporate law, do not violate the fiduciary relationship and are not subject to criticism. Of course, the president of the smallest corporation may not deal with corporate property for his own benefit and at the expense of the creditors or other stockholders. But this does not mean that by reason of the fact that he is president, he is thereby in some way prohibited from dealing with the corporate property in such a manner

as will not prejudice creditors and will affirmatively benefit every stockholder. In short, can it be said that the corporation can have a "best interest" of its own separate and distinct from and inconsistent with the "best interests" of the creditors and stockholders? We think not. The fallacy in such a proposition is easily demonstrated. If a corporation may have a "best interest" of its own, then its ultimate and greatest interest would be in continuing its corporate existence perpetually, for self-preservation is the first law of nature. If then the directors of the corporation should take action to terminate the corporate existence, it follows that they would be violating their fiduciary obligations. The directors would, therefore, be obliged to vote against dissolution even though dissolution might be desired by all of the stockholders or whatever majority thereof may be empowered to bring about dissolution under the law of the State or country of the corporation's domicile. Since dissolution procedure in nearly all jurisdictions provides for action by the directors as a required step, it would then be impossible ever to dissolve a corporation.

In our case, Cumberland Public Service Company was in the public utility business, serving a few small communities in three counties of Southern Kentucky (R. 56). Its source of electric power (generating equipment) was inadequate and it was gradually being surrounded by the operations of Tri-County, whose purpose was to absorb it. Soon after Tri-County began operating, it became evident to Cumberland that unless it could contract to obtain electric power from Tennessee Valley Authority, it would eventually have to

resign itself to this absorption (R. 58). In October, 1939, Mr. McComas called upon the Chief Power Engineer of Tennessee Valley Authority and when it was learned that no power could be obtained from that source, the handwriting was on the wall. With the last hope for new life-blood denied, it then became inevitable that this little utility company could not survive long. Whether the corporation first dissolved and then permitted the stockholders to receive the assets and dispose of them or whether the corporation should first sell its property and then dissolve—in either event dissolution was the logical course. This dissolution is now characterized by the Government as a useless device comparable to the sham corporation found in *Gregory* v. *Helvering*, and in that case created to give the appearance of a corporate reorganization otherwise serving no imaginable purpose.

Since the termination of the corporate existence of Cumberland Public Service Company by reason of its imminent inability to continue adequate electric service to its customers was clearly written in the sky, it became the duty of the officers and directors to select which of several courses should be pursued. Engulfment by Tri-County could be accomplished in three separate ways, each as lawful as the others:

(a) The stockholders could sell all of the outstanding stock to Tri-County and pay their individual taxes on the resulting capital gain.

(b) The corporation (with the consent of the holders of not less than three-fourths of the capital stock)[9]

[9]Carroll's Kentucky Statutes, 1936 Edition, Section 883(b)-3.

could sell properties direct to Tri-County. In this event the capital gain, if any, would result in a tax liability of the corporation. Having sold its flesh and bones (franchises and distribution lines) it would no longer have been able to carry out the purposes of its incorporation and would in due course have dissolved, wound up its affairs, liquidated its assets, and made distribution to the stockholders who would then have had to pay a second tax.

(c) The stockholders acting in the manner provided by law could dissolve the corporation, distribute its assets either in cash or in kind, and leave the stockholders to their own devices. If this course was followed, then under the law and the Treasury Regulations the corporation would be chargeable with neither gain nor loss and the stockholders would then pay whatever tax was incident to their transaction.

It will be observed that all three courses were, under the law of Kentucky as it existed at that time, wholly within the control of the stockholders. The corporation could not be dissolved without their consent and the corporation could not sell all or substantially all of its assets without their consent. If the corporation received an offer for its properties, it could not have accepted the same without consulting the stockholders.

Acting upon the doctrine so often affirmed by this Court that they were at liberty to select the course of action which would minimize taxes, the stockholders looked over the three alternatives disclosed above and decided to proceed by attempting to sell the stock. This they did through W. L. McComas on February 16, 1940,

at the Murfreesboro meeting. Although the REA engineer voiced a doubt as to whether Tri-County could obtain a loan from the REA for the purpose of buying the stock, he did not know the answer to this question and "the determination of this question was deferred until the legal representatives of the REA in Washington could be consulted" (R. 60).

With the matter in this state, the parties separated and the next development was the REA letter of April 11, 1940 (R. 60) suggesting that the REA would approve a loan to Tri-County for $86,750 if the deal could be made at that price. This proposition was declined by Mr. McComas and Mr. Mayes (R. 61). On May 15, 1940, Grafton was in Washington and called at the REA office to ascertain whether the offer could be increased. The REA attorneys were called in and they then, for the first time, communicated their decision that the REA was without lawful authority to make a loan for the purchase of stock. Mr. Herring, the engineer representing the REA, then made an offer of $104,000 for the physical properties desired (which was, of course, an offer to the corporation). Grafton communicated this offer to McComas and Mayes, whereupon the accountants were employed, the tax aspects surveyed, the offer was rejected and the new proposal of the stockholders submitted (R. 61-64).

The Government insists that when Mr. McComas attended the conference in Murfreesboro, Tennessee, he was just as much the president of the corporation as the representative of the stockholders and that his

action in offering to sell the stock should be construed as a corporate offer to sell the property. The short answer to this proposition is that in offering to sell the outstanding stock, Mr. McComas could not have been speaking for the corporation, for the corporation did not own its outstanding stock. That stock was owned by the stockholders and an offer to sell it could be made only by the stockholders themselves or someone acting in their behalf.

In *Howell Turpentine Co.* v. *Commissioner*, 162 F. 2d 319 (322), the Court of Appeals for the Fifth Circuit pointed out that a stockholder of a corporation as such has no title, legal or equitable, to the corporation's property; that he can sell his interest by selling his stock; but that he cannot effectively convey any particular property of the corporation prior to a liquidation. The Court then goes on with the following statement which we believe to be a correct statement of the law:

> "But he may validly *contract to sell* it before any steps are taken towards liquidation, if he has a reasonable prospect of obtaining title to it within the time fixed by the contract for the conveyance. This is true of stockholders as it is of people in general who have a prospect of obtaining title and are willing to assume a personal liability if they should fail. 'It is not unusual for persons to agree to convey by a certain time notwithstanding they have no title to the land at the time of the contract, and the validity of such agreements is upheld. In such cases the vendor assumes the risk of acquiring the title and making

the conveyance, or responding in damages for the vendee's loss of his bargain. * * * Whenever one is so situated with reference to a tract of land that he can acquire the title thereto, either by the voluntary act of the parties holding the title, or by proceedings at law or in equity, he is in position to make a valid agreement for the sale thereof, without disclosing the nature of his title.'" (The emphasis was supplied by the Court.)

Later in the same opinion it is said:

"* * * The only plausible ground put forward for inferring the sale to have been made by the Company is that the property was owned by it and that D. F. Howell was its president and could appropriately have negotiated for the Company prior to Sept. 6. But it is equally true that he was the controlling stockholder and could as appropriately have negotiated for himself and did not have to own the land, under the circumstances, to do so."

The suggestion of a contrary view which is found in *Kaufmann* v. *Commissioner*, 175 F. 2d 28, was, we believe, made without adequate analysis. In any event the facts in that case are clearly distinguishable as we will undertake to demonstrate later in this brief.

**SECOND POINT: The Contract of the Stockholders Was Real In That It Was Binding Upon Them and Imposed A Liability Upon Them for Which They Could Have Been Required To Respond In Damages Whether They Were Successful In Obtaining the Property In Liquidation or Not.**

There is no suggestion in the record that there were any agreements or understandings, concealed or otherwise, between the corporation and Tri-County. Only one agreement was made in the entire course of the proceedings. That agreement was reached when Tri-County accepted the offer of McComas and Mayes as set forth in Arthur Grafton's letter of May 31, 1940 (R. 62-63). The Court of Claims found that "* * * the offer of May 31 was accepted by Tri-County" (Finding 12, R. 64). The agreement so reached was embodied in a contract which was dated June 10, 1940 (the date of the acceptance). The material portions of that contract are found on pages 64 and 65 of the record and speak for themselves. The agreement was clearly an undertaking of McComas and Mayes and was not an undertaking of the corporation. As such it was binding upon McComas and Mayes and if they had breached it by failing in any way or for any reason to acquire good title to the properties and to make the subsequent conveyance to Tri-County, they could have been held liable for such breach.[10] In the

[10]Several events could have transpired which would have made the carrying out of this contract difficult or impossible. Public utilities in Kentucky are subject to the jurisdiction of the Kentucky Public Service Commission, and a public utility corporation may not dissolve or sell its properties, or transfer its certificates of convenience and necessity, or issue stock, or make long-term capital loans, without application to

event of such a breach, McComas and Mayes would not have been permitted to escape liability because of impossibility of performing the contract.

In *Consolidated Realty Co.* v. *Richmond Hotel & Building Co.*, 253 Ky. 463, 69 S. W. 2d 985, the parties contracted that each would cause certain lands to be dedicated to public use so that a desired street might be opened. One of the parties carried out the contract by making the agreed dedication. The other parties failed to do so and, upon being sued for breach of the contract, attempted to defend on the ground that they did not own the land involved, and could not acquire it. The following is quoted from the opinion of the highest Court of Kentucky:

> "Neither the bond nor the contract expressly discloses the parties thereto were the owners of the Collins or Irvine properties at the time of their execution and delivery. This fact in no wise affected their validity. It was not essential to the validity of either that the respective parties at the time of the execution of same were the owners of the land they respectively thereby agreed to dedicate to the city for street purposes. Schmidt v. Martin, 199 Ky. 782, 251 S. W. 999. If either of the parties to the contract and the bond at the time of their execution had no title, nor color of title, to the land they thereby agreed to dedicate to the city, this fact did not constitute a physical

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and approval by that Commission. Hearings are held, interested communities are notified, and it by no means follows as a matter of course that such approval will be obtained. Difficulties could also have arisen in the event of the death or incapacity of stockholders, for in that event the necessary cooperation would have been under the control of executors or committees which might or might not have agreed that the plan was desirable.

impossibility of the performance of their promise, since it was competent for either party to acquire title afterwards and render themselves able to dedicate a perfect title to the city for street purposes at the time fixed by the contract." (Citing cases.)

In the American Law Institute's Restatement of the Law, subject "Contracts," Vol. 2, Sec. 455, the law is stated thus:

> "Impossibility of performing a promise that is not due to the nature of the performance but wholly to the inability of the individual promisor, neither prevents the formation of a contract nor discharges a duty created by a contract."

In the text following the above statement of the law examples are cited. The one most clearly on all fours with the situation we are considering is example (6), which is stated as follows:

> "A contracts with B to obtain A's father's consent to the lease of certain premises to B. A's father, because of unreasonable displeasure with A's conduct, refuses to have any discussion with A concerning the matter. A's duty is not discharged."

We submit that the written contract was the only agreement made, that it was clearly made with the stockholders, McComas and Mayes, and that it was real and binding in every respect with accompanying and resulting liabilities.

**THIRD POINT: Taxpayers Have the Right To Conduct Themselves In Any Lawful Manner and the Fact That Their Sole Motive In Choosing One Lawful Course Or Another Is To Minimize Their Tax Liabilities Is Immaterial. It Is Not Even Relevant.**

Where the actions of a taxpayer are lawful and free from fraud, sham or subterfuge, the fact that his motive in choosing a particular course of conduct is solely because that course gives rise to a smaller tax liability than any other, is wholly immaterial and has no bearing whatever upon a decision as to the taxability of that course of conduct. This principle of law has been reaffirmed so often that it should be unnecessary to dwell upon it at length or to cite a welter of authorities.

The leading case and the one most often quoted is that of this Court in the case of *U. S.* v. *Isham*, 17 Wall. 496. The taxpayer adopted a method of doing business to avoid tax liability, and the Government contended that it was simply a device and constituted a fraud upon the revenue. This Court said:

> "This may be true, and if not true in fact in this case it may well be true in other instances. To this objection there is an answer:
>
> "That if the device is carried out by the means of legal forms, it is subject to no legal censure. To illustrate: The Stamp Act of 1862 imposed a duty of two cents upon a bank check, when drawn for an amount not less than $20. A careful individual, having the amount of $20 to pay, pays the same by handing to his creditor two

checks of $10 each. He thus draws checks in payment of his debt to the amount of $20, and yet pays no stamp duty. This practice and this system he pursues habitually and persistently. While his operations deprive the Government of the duties it might reasonably expect to receive, it is not perceived that the practice is open to the charge of fraud. He resorts to devices to avoid the payment of duties, but they are not illegal. He has the legal right to split up his evidences of payment and thus to avoid the tax."

In *Gregory* v. *Helvering*, 293 U. S. 465, in speaking of a different type of factual situation, this Court said:

> "It is quite true that if a reorganization in reality was effected within the meaning of Subdivision B,[11] the ulterior purpose mentioned will be disregarded. The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted." (Citing other authorities.)

The Government in its brief (p. 23) states that it subscribes to this principle "wholeheartedly" but we have never yet encountered a state of facts in a tax controversy where the Government has been willing to admit that the principle is applicable. We submit that it is clearly applicable to this case.

[11]Here reference is made to Subdivision (B) of Section 112(i) of the Revenue Act of 1928, exempting gains in corporate reorganizations.

**FOURTH POINT: *Commissioner v. Court Holding Co.*, 324 U. S. 331, Is Not Controlling. In That Case the Corporation Clearly Made the Sale and Thereafter Employed A Device In An Attempt To Avoid the Tax Liability Which Had Already Accrued.**

In the *Court Holding Co.* case it is shown as a fact that the negotiations were between the corporation and the prospective purchasers. As a result of those negotiations, an oral agreement was reached as to the terms and conditions of sale and the parties then met to reduce the agreement to writing.

It is our view that when the agreement was so reached between the corporation and the purchasers, a tax liability accrued to the corporation providing only that the sale was made and not abandoned. The agreement to sell (if subsequently carried out) was the event which gave rise to the tax liability and no devious courses or devices or pretenses thereafter could transfer that tax liability or alter its nature. The Tax Court found that despite the appearance of a liquidating dividend, followed by a conveyance by the stockholders, the corporation had not abandoned the sales negotiations. The sale which was completed was the same sale which the corporation had negotiated and agreed upon and it was obviously the corporation's sale which was carried out. This is conclusively shown by the fact that prior to the emergence of the tax factor, the corporation accepted a down-payment of $1,000 from the purchasers. If this down-payment had been returned to the purchasers, it might at least have

been some evidence of the genuineness of the corporation's claimed abandonment of the sale. However, the down-payment was not returned but was kept by the corporation and even allowed as a credit upon the contractual purchase price when the transaction was consummated.

This Court reversed the Court of Appeals and affirmed the conclusion of the Tax Court that the sale was made by the corporation so that any gain was taxable to it. Once it was concluded that the sale was made by the corporation, the corporation was established as the source of the transfer and the purchasers were established as the end point of the transfer. No procedure could subsequently have been adopted to change the tax liability arising from this transaction and when the stockholders attempted to use the liquidating dividend and their conveyance as a means of carrying out the contract, they became, as this Court said, "a conduit through which to pass the title."

In our case the stockholders were not conduits through which the title was passed by the corporation to the purchaser in order to carry out a corporate contract, but were themselves principals in the only contract of sale which was ever agreed upon. The stockholders were taxable entities separate and distinct from their corporation. They did not act for the corporation or bind the corporation or purport to bind the corporation. The offer that was made to the corporation was flatly rejected. The offer that was accepted was clearly the offer of the stockholders and

it was so understood by Tri-County, for the agreement which was signed by Tri-County is unambiguous in this respect.

It is submitted that the *Court Holding Co.* case does not control the vitally different factual situation presented by the record here.

## THE AUTHORITIES RELIED UPON BY THE GOVERNMENT ARE ANALYZED AND SHOWN TO BE INAPPLICABLE.

In addition to *Commissioner* v. *Court Holding Co.*, 324 U. S. 331, which we have discussed above in a separate heading, the government relies upon a number of other cases, some of which are plainly distinguishable on the facts, and some of which are so far afield both in factual situations and in principles of law involved that the reason for citing them is baffling to us. We will discuss them in numbered paragraphs.

(1) *Kaufmann* v. *Commissioner*, 175 F. 2d 28.

This case was somewhat similar to our case in general pattern; but upon consideration of all of the surrounding facts and circumstances, the Tax Court there found as a fact that the sale was made by the corporation, followed by a "conduit" transfer to the purchaser through the stockholders, as in the *Court Holding Co.* case. The evidence in that case gave reasonable support to such decision. There the president of the corporation was neither a stockholder nor a director of the corporation. He negotiated with the purchaser and an agreement for the sale of the corporation's

property was reached. The contract of sale was signed by the president of the corporation purporting to act as attorney in fact for the stockholders; but the president, who was not himself a stockholder, did not testify in the case and the record was, therefore, bare on the question as to whether the negotiations and sale agreement were the result of his efforts on behalf of the corporation or on behalf of the stockholders. In the absence of any showing that he had been constituted agent and attorney in fact for the stockholders during the time when the transactions was negotiated and agreed upon, the Court not unreasonably concluded that he must have been acting for the corporation and as president of the corporation, for this was the only capacity he had at that time as far as the record showed.

The difference between this case and our case is that Mr. McComas obviously represented the stockholders rather than the corporation in all that took place between the Murfreesboro meeting of April 16, 1940, and the time of the offer to the corporation on May 15, 1940, because during that period he made no offer to sell anything but the outstanding capital stock which belonged to the stockholders and could not have been sold by the corporation.

(2) *Wichita Terminal El. Co.* v. *Commissioner*, 162 F. 2d 513.

In this case, also, the Tax Court heard the evidence, and, after considering the surrounding circumstances as prescribed in the *Court Holding Co.* case,

found that the sale was made on behalf of the corporation rather than on behalf of the stockholders. Significantly, the persons who conducted the negotiations (the president of the selling corporation and the president of the purchasing corporation) did not testify before the Tax Court; and the record was, therefore, void of any evidence as to what they intended to do and for whom the president of the selling corporation was negotiating. Without such testimony, the Tax Court was obliged to decide the case on the circumstantial evidence alone.

These circumstances do not exist in our case. In our case there was testimony of the persons who represented both the selling interests and the purchasing interests, accompanied by documentary evidence in the form of letters and contracts which clearly disclose the nature of the negotiations, the parties who participated therein, the agreement reached, and the nature of the agreement. The Court of Claims, after a hearing, has found that the evidence shows negotiations by the stockholders for themselves through one of their number; a refusal by the corporation to accept an offer which it ultimately received as a result of the stockholders' negotiations; a new offer on behalf of the stockholders under a new, lawful plan which was the equivalent in result to that which they had previously attempted to negotiate; and an acceptance by the purchaser of this second offer from the stockholders.

(3) *Guinness* v. *United States*, 73 F. Supp. 119, certiorari denied, 334 U. S. 819.

Properly regarded, the three opinions written by various judges of the Court of Claims in the *Guinness* case are not authority for anything. The Court of Claims is composed of five judges, and the statute[12] provides that "the concurrence of three judges shall be necessary to the decision of any case." The chief judge of the Court was ill at the time and did not participate. Of the four remaining judges only two concurred in the first opinion. A second opinion was written by another judge, who agreed with the *result only*, based upon facts which the other judges did not consider material. A third opinion was written by another judge, who flatly dissented. Accordingly the *result* (failure of the taxpayer to recover a judgment) was supported by the concurrence of three judges as required, but none of the opinions was supported by such required concurrence, which means that they are not the opinions of the Court of Claims.

There also the facts were materially different. The case was confused and complicated by the circumstance that the property sold (165,000 shares of the stock of Standard Power & Light Corporation) was divided into one block of 15,000 shares which was sold by the negotiators as admitted agents of the corporation, and another block of 150,000 shares which was purportedly sold on behalf of the stockholders of the selling corporation in anticipation of the receipt thereof as a

[12]U. S. C. A., Title 28, Section 243.

liquidating dividend. The denial of certiorari was simply a refusal of this Court to review the case and we have no means of knowing what might have been the reason for such refusal. Certiorari could have been denied because this Court was of the opinion that the factor which only Judge Whitaker considered important was controlling, in which event the *result* was correct. On the other hand, certiorari could have been denied because this Court was of the opinion that under the circumstances shown by the evidence and after considering all of the factors, the sale was actually made by the corporation. Or, and more likely, certiorari was denied simply because no important principle of law was involved.

It should be noted that the Court of Claims itself, which decided the *Guinness* case, found no difficulty in distinguishing it from the instant case.

(4) *Fairfield S. S. Corp.* v. *Commissioner*, 157 F. 2d 321, certiorari denied 329 U. S. 774.

This case involved two corporations instead of one. A ship was owned by Fairfield Steamship Company, all of whose capital stock was in turn owned by Atlantic Coast Shipping Company. Atlantic caused a dissolution of Fairfield and received the ship as a dividend in kind as an incident of the liquidation of Fairfield. Atlantic then sold the ship. The decision turned not upon the factual situation, but upon the construction of an Internal Revenue Code provision which is not involved in the instant case. The Court of Appeals for the Second Circuit held that the intent of

the applicable Code provision did not encompass the sequence of events.

The following is quoted from the opinion to illustrate what the Court thought of the factual situation and the conclusion to be drawn therefrom had the said point of law not been considered controlling:

> "* * * Thus, so far as the transaction depended upon the actual intent of the only parties who could have any intent, it is impossible to find support in the record for a finding that the Fairfield Company made the sale; and if that was the legal result of what they did, it was imposed upon the transaction in spite of their intent. The case is further complicated by the fact that the majority relied for their decision upon an interpretation of Commissioner v. Court Holding Co., 324 U. S. 331, 65 S. Ct. 707, 89 L. Ed. 981, to which we cannot agree. On the contrary we think that the minority were right in believing that that case turned upon the fact that all the preliminary negotiations had been made expressly with the corporation; and that it was only after the bargain had been struck, that the device of a liquidation was brought in as *deus ex machina*. The contrary was true here."

(5) *Griffiths* v. *Commissioner*, 308 U. S. 355.

This is not the same type of case at all. In 1926, the taxpayer bought corporate stock for $100,000. In 1931, he realized that he had made a bad bargain and took a loss of $92,500 which was claimed for tax purposes and which was recognized by the Commissioner as a deductible loss for that year. In 1932, the tax-

payer learned that he had been defrauded by the party from whom he had purchased the stock. He brought about an agreement of that person to repurchase the stock for $100,000. Since he had previously been allowed a deductible loss, such a repurchase would obviously result in a taxable gain of the same amount. In an effort to avoid this result, the taxpayer conceived the idea of forming a corporation which would reacquire the shares which he had disposed of, return them to the taxpayer for $100,000, and then distribute the $100,000 to the taxpayer in installments over a period of years. However, when the taxpayer carried out the transaction he did not even consistently follow the device which he had planned. The party who had agreed to make good the loss was never informed of the existence of the corporation which the taxpayer had created and had no dealings with that corporation. The taxpayer received the $100,000 personally and gave his personal release to the party who had defrauded him. It was only *after* this had been done that the taxpayer turned the stock over to the corporation in pursuance of his scheme. It is obvious that the taxpayer himself received the $100,000 and the gain accrued to him. He could not thereafter escape the tax liability by transferring the property to a separate and distinct taxable entity. Neither on the facts nor on the principles of law does this case have any bearing upon our case.

(6) *Minnesota Tea Co.* v. *Helvering*, 302 U. S. 609.

We cannot understand how this case can have any bearing upon the issues here involved. Minnesota Tea

Co. received approximately $426,000 which was distributed to its stockholders, pursuant to a plan of reorganization, subject to a condition that the stockholders agree to discharge debts of the corporation amounting to approximately $106,000. It was held that to the extent of the corporate debts which were discharged by the stockholders, the corporation had realized a taxable gain.

The decision in the case was obvious. The debts were the debts of the corporation. If they were assumed by the stockholders, obviously to that extent the stockholders did not receive a liquidating dividend at all. Further discussion of this case appears useless.

(7) *Gregory* v. *Helvering*, 293 U. S. 465.

This case involved entirely different facts and an entirely different principle of law. The taxpayer owned all of the stock of Corporation A which held among its assets some shares of corporate stock which could be sold at an advantageous price. If sold by Corporation A substantial taxes would have accrued. In an effort to avoid these taxes the taxpayer caused to be organized Corporation B which issued all of its capital stock to her in exchange for the transfer to B of the corporate stock which was to be sold. Thereupon Corporation B was immediately dissolved and the corporate shares in question, being its only assets, were turned over to the taxpayer as the sole stockholder. The taxpayer then claimed that a "reorganization" had taken place within the meaning of Section 112 (g) of the Revenue Act of 1928. There was no

doubt that the various steps were really taken in strict conformity with the legal requirements literally construed. However, this Court held that the organization of a corporation for no other purpose than to sign papers and then dissolve did not constitute such a "reorganization" as was contemplated by the applicable statute.

Cases of corporate reorganizations involve qualification by the taxpayer for an exemption from a tax which would otherwise accrue. The question in our case is not this, but whether a tax accrued to Cumberland Public Service Company to begin with. We do not have any question of the creation and immediate dissolution of a sham corporation, but rather have the case of a genuine corporation which had been in business for twenty years or more and which did not take any sham action whatsoever. The dissolution of a genuine business corporation is a step authorized by law and the dissolution in our case was real, final, and without sham or subterfuge.

(8) *Moline Properties* v. *Commissioner*, 319 U. S. 436.

In this case a single person owned all of the capital stock of the corporation. Title to certain property was vested in the corporation. A sale of the property was made while title was still in the corporation and while the corporation continued to exist. There was no dissolution and no claim that a liquidating dividend had been made. The stockholder reported the gain from the sale as his personal gain and argued that

the corporation should be disregarded as amounting to nothing more than a paper fiction.

Our case bears no resemblance. We not only recognize that the corporation existed, but rely upon its separate existence as a bar to the collection from it of a tax which grew out of the actions of the stockholders.

(9) *United States* v. *Joliet & Chicago R. Co.*, 315 U. S. 44.

In this case a corporation leased its properties and attempted to avoid the corporate tax by directing that the rentals be paid to the stockholders instead of to itself. The corporation did not dissolve but continued in existence for many years.

Since the properties were leased by the corporation and at a time when the properties belonged to the corporation, we do not understand how it could have been claimed in good faith that the resulting rentals were not properties of the corporation. This being the case, the stockholders could receive the rentals only by virtue of their relationship with the corporation.

Our case plainly differs. In our case the corporation was dissolved and the "umbilical cord" was definitely and finally cut in the manner provided by law.

(10) *Burnet* v. *Commonwealth Imp. Co.*, 287 U. S. 415.

This was another case in which a corporation parted with its property, received a consideration for it, continued its corporate existence, and sought to

have its corporate entity disregarded on the theory that it was a mere agent of a decedent's estate. The case has nothing in common with ours.

(11) *National Carbide Corp.* v. *Commissioner,* 336 U. S. 422.

In this case National Carbide Corp. owned all of the stock of four subsidiary corporations. Each of the four subsidiaries controlled and carried on a branch or division of the over-all business of the parent. There were agreements between the parent and the subsidiaries that each subsidiary should retain 6% of its net income and pay all the rest to the parent. The contention was that the subsidiaries were mere agents serving on the equivalent of a commission basis, that the retained 6% constituted their only taxable income, and that the balance would be taxable to the parent corporation.

This Court refused to disregard the separate corporate entities and held that each must be taxed upon the gain resulting from its own receipt of income.

## CONCLUSION.

The Court of Claims heard the evidence and established that the sale was made by the stockholders rather than by Cumberland Public Service Company. In our view of the matter that ended the case. The corporation had its own independent existence and was a separate entity recognized for tax purposes. It could only be taxed for a gain which it realized. It

did not realize any gain. Instead it was dissolved and the assets in question passed to the stockholders, without gain or loss to the corporation, as provided by the Treasury Regulations. The stockholders sold those assets, realized gains, and incurred tax liabilities. Those tax liabilities were reported and paid. There is no basis upon which it can be asserted that a tax liability accrued against the corporation.

The judgment of the Court of Claims should be affirmed.

Respectfully submitted,

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# APPENDIX A.

## STATUTES AND REGULATIONS INVOLVED.

**Internal Revenue Code:**

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

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(26 U. S. C. 1946 ed., Sec. 22.)

TREASURY REGULATIONS 103, promulgated under the Internal Revenue Code:

SEC. 19.22(a)-19. *Sale of capital assets by corporation.*—If property is acquired and later sold for an amount in excess of the cost or other basis, the gain on the sale is income. If, then, a corporation sells its capital assets in whole or in part, it shall include in its gross income for the year in which the sale was made the gain from such sale, computed as provided in sections 111 to 113, inclusive. If the purchaser takes over all the assets and assumes the liabilities, the amount so assumed is part of the selling price.

SEC. 19.22(a)-21. *Gross income of corporation in liquidation.*—When a corporation in dissolved, its affairs are usually wound up by a receiver or trustees in dissolution. The corporate existence is continued for the purpose of liquidating the assets and paying the debts,

and such receiver or trustees stand in the stead of the corporation for such purposes. (See sections 274 and 298.) Any sales of property by them are to be treated as if made by the corporation for the purpose of ascertaining the gain or loss. No gain or loss is realized by a corporation from the mere distribution of its assets in kind in partial or complete liquidation, however they may have appreciated or depreciated in value since their acquisition. But see section 44(d) and section 19.44-5. (See further section 19.52-2.)